April 19, 2010

VIA ELECTRONIC MAIL:  http://www.regulations.gov

Mr. Stephen Llewellyn
Executive Officer
Executive Secretariat, Equal Employment Opportunity Commission
U.S. Equal Employment Opportunity Commission
131 “M” Street, N.E.
Washington, DC  20507

Re:  RIN 3046-AA87
Comments on Notice of Proposed Rulemaking: Definition of “Reasonable Factors Other Than Age” Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7212 (February 18, 2010)

Dear Mr. Llewellyn:


The Society for Human Resource Management (SHRM) is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in Canada and India.

SHRM’s membership comprises HR professionals who are responsible for developing and administering their employer’s human resource policies and practices, including policies and practices relating to hiring, compensation, promotion, training and termination of employees.

Although SHRM is generally appreciative of the many efforts by the Commission to help HR professionals comply with the Age Discrimination in Employment Act (ADEA), we have come to the unfortunate conclusion that the proposed rule does not achieve this end; indeed, it restricts our members’ decision-making beyond what the law currently allows.
It also, unfortunately, leaves them with far less practical guidance than they have under the current legal scheme. After a careful reading of the NPRM, the ADEA, and the leading Supreme Court cases, we conclude that the proposed rule is unsupportable in law and infeasible in practice.

As an organization that has sought over the years to work constructively with the EEOC to achieve our mutually desired goal of a workplace free of discrimination, we fear that the Commission’s obvious overreaching in this case will substantially damage its credibility with the courts, while doing very little to further understanding among employers on how to best comply with the ADEA. For the following reasons, we urge the EEOC to withdraw the proposed rule.

The Legal Framework

To explain our concerns, we think it is useful to begin with the language of the statute. The ADEA states that conduct that would otherwise be prohibited is “not unlawful . . . where the differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623(f)(1) (emphasis added). In short, to determine liability, the court and jury must look at the factors upon which the employer’s decision was based. Rather than address itself to this issue, however, the NPRM would in effect substitute an entirely different issue: Whether a hypothetical reasonable employer, mindful of the ADEA, seeking to maximize the employment opportunities of older workers, would have chosen the same action.

Neither the statute nor the Supreme Court cases interpreting it, including notably Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), Smith v. City of Jackson, 544 U.S. 228 (2005), and Meacham v. Knolls Atomic Power Laboratory, 554 U.S. --- , 128 S. Ct. 2395 (2008), makes any reference at all to the concept of a “reasonable employer.” Although we recognize why the Commission would prefer an open-ended review of the entire decision process to one that narrowly focuses on the factors that actually formed the basis for the employer’s actions, we can find no principled way to square the NPRM with the language of the statute or the Supreme Court decisions.

In Hazen Paper, the Court addressed the question whether “an employer violates the ADEA by acting on the basis of a factor, such as an employee’s pension status or seniority, that is empirically correlated with age.” 507 U.S. at 608. The Court’s answer was clear and unequivocal: An employment decision motivated by such a factor does not violate the ADEA, “[e]ven if the motivating factor is correlated with age.” Id. at 611.

Hazen Paper was a disparate treatment case, but the Court’s analysis is applicable, and critical, to an understanding of the RFOA defense. In Hazen Paper, the Court held that a decision based on a factor that is closely correlated with age is not the same as a decision that is based on age. Thus, the Court said, an employer who has fired older workers because it believes that older workers are typically less productive has made a decision based on age and has violated the ADEA, but an employer who has fired employees who are unproductive, even if those employees
happen to be older, has made a decision based on a factor other than age. *Id.* at 610-11. To transpose this reasoning to the disparate impact context, a decision that was based on a factor such as productivity, seniority, salary, etc., will be one that was based on a factor that is “other than age.”

In *City of Jackson*, the Supreme Court held that the disparate impact theory of discrimination is applicable to age discrimination cases. But the Court made clear that the disparate impact theory under the ADEA operates significantly differently from the disparate impact theory under Title VII: “Unlike Title VII, however, §4(f)(1) of the ADEA, 81 Stat. 603, contains language that *significantly narrows its coverage* by permitting any ‘otherwise prohibited’ action ‘where the differentiation is based on reasonable factors other than age.’” 544 U.S. at 233 (emphasis added). The Court noted that in cases involving disparate impact claims, “the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was ‘reasonable.’” *Id.* at 239. In *City of Jackson*, the Court found that the City’s adoption of a pay plan for its police force that gave higher percentage wage increases to employees in lower ranks than to employees in higher ranks, even though the employees in the higher ranks were disproportionately older, did not violate the ADEA because the decision was based on a reasonable factor other than age – specifically, the desire to bring salaries in line with those of comparable other communities. *Id.* at 242.

Significantly, the Court rejected the contention that the employer was under any obligation to assess the disparate impact of the plan it had adopted and consider whether there were alternative arrangements that could have achieved its objectives without such an impact. Rather, the Court said, “[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, *the reasonableness inquiry includes no such requirement.*” *Id.* at 243 (emphasis added).

Most recently, in *Meacham*, the Court clarified the burden of proof in disparate impact cases under the ADEA, specifying that the RFOA defense is an affirmative defense that the employer bears the burden of proving. Significantly, however, the Court was not troubled by the fact that the employer in that case had based its decision on subjective criteria, or that the company had given its supervisors discretion to make judgments concerning such matters as the employees’ “flexibility.” *See* 128 S. Ct. at 2396.¹ Nor did the Court suggest that the touchstone for whether the employer had acted on a reasonable factor other than age was whether a hypothetical reasonable employer, under all the facts and circumstances, mindful of the ADEA, aware of the disparate impact of its action and seeking to minimize that impact, would have chosen the same course of action. Rather, the Court took pains to repeat its message from *City of Jackson* that “Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the

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¹ In fact, the Court noted that putting the burden of proving RFOA on the defendant would, as a practical matter, likely make a significant difference in the employer’s burden only in those cases “where the reasonableness of the non-age factor is obscure for some reason.” 128 S. Ct. at 2406.
RFOA clause into the ADEA, ‘significantly narrowing its coverage.”” Id. at 2406 (quoting City of Jackson, 544 U.S. at 233).

Taken together, these cases strongly suggest that a “reasonable” non-age factor is one that is intended to further a legitimate business interest, as opposed to one that is arbitrary or capricious. Notably, the ADEA’s statement of Congressional findings and purposes refers three times to the Congressional objective of eliminating “arbitrary” age discrimination. 29 U.S.C. §§ 621(a)(2), (a)(4), and (b). The courts have not struggled with the concept of what is “reasonable” to state an RFOA defense, and we are aware of no court that has turned to tort law for a definition of the term.

The Proposed Rule

Although the NPRM cites to the holdings and relevant passages of Hazen Paper, City of Jackson and Meacham, we have a difficult time finding any connection between those decisions – or, indeed, the text of the ADEA itself – and the proposed regulations. Instead, the proposed regulations substitute a hypothetical “reasonable employer” standard derived from tort law concepts, for the “reasonable factor” test actually contained in the statute and applied by the Supreme Court. By doing this, the NPRM would focus the “reasonableness” inquiry on the employer’s process rather than on the actual factors that motivated the employer.

The proposed regulations would require courts to consider “whether the employer has made reasonable efforts to administer its employment practice accurately and fairly and has assessed the age-based impact of the practice and taken steps to ameliorate unnecessary and avoidable harm.” 75 Fed. Reg. at 7215. The NPRM deduces that “[s]teps such as training its managers to avoid age based stereotyping, identifying specific knowledge or skills the employer wants to retain . . . and providing guidance . . . are evidence of reasonableness.” Id. Also to be factored into the determination of reasonableness (in some indeterminate fashion), are concepts of “degree of injury” and “scope of impact,” because “a reasonable employer would investigate the reason for the result and attempt to reduce the impact to the extent appropriate to the given facts.” Id.

Finally, although the NPRM acknowledges that “[u]nlike Title VII’s business necessity defense, which requires an employer to use the least discriminatory alternative,2 the reasonableness inquiry includes no such requirement,” the proposed regulations actually negate this recognition of the state of the law. Indeed, under the NPRM, “[a]n employer’s knowledge of and failure to use equally effective, but less discriminatory, alternatives is relevant to whether the employer’s chosen practice is reasonable.” Id.

The NPRM gives no instruction to an employer, or a jury, as to what to do with these various elements once it has ascertained the “extent” to which they are or are not present.

2 This is actually an incorrect statement of the business necessity defense under Title VII. See generally El v. SEPTA, 479 F.3d 232 (3rd Cir. 2007).
Moreover, these are expressly not the only elements to be considered. Other, unspecified factors will also go into the calculus of the “reasonable employer.”

Analysis of the NPRM – Legal Flaws

We note at the outset that a “reasonable employer” standard does not appear in the statute. Further, the Supreme Court cases interpreting the statute in no way suggest that the concept of a hypothetical “reasonable employer” is necessary or even relevant to the task of determining whether an employer decision was based on a “reasonable factor other than age.” We believe, therefore, that the NPRM’s reliance on tort law is entirely misplaced. The fact that the word “reasonable” features prominently in both tort law and the RFOA defense is too slender a reed to support the NPRM’s importation of tort-law concepts into the RFOA. “Reason” is a prominent feature in antitrust law, too, but that does not mean that Congress intended the courts to scour the antitrust cases to help assess an RFOA defense. Indeed, the tort law concept of the “reasonable person” as a touchstone for determining liability was well known to Congress in 1967, and Congress certainly could have adopted tort concepts explicitly if it had wanted to import that body of law. It would have been a strange choice. In tort law, the failure to exercise the care that a reasonable person would exercise in the circumstances is a basis for liability, not the formulation for a defense. Moreover, the tort concept is used to describe actions, not motivations, and thus is not pertinent to the inquiry called for in the ADEA.

The fact that the Supreme Court adopted some agency law principles in Faragher and Ellerth to circumscribe vicarious liability in sexual harassment cases does not indicate that the Court would be prepared to accept a new, tort-derived “reasonable employer” concept for the RFOA defense. When the Commission articulated specific policies that an employer could adopt to defeat liability for sexual harassment, it did so against a backdrop of a well-established recognition in the employer community of the basic content and function of such policies. This NPRM does not propose narrow, specific policies, and there is no comparable consensus in the business community to support the open-ended definition of the RFOA defense that this NPRM proposes to establish.

Similarly, we believe that the NPRM is straying too far from the language of the statute and the Supreme Court cases when it attempts to describe which factors are factors “other than age.” Again, the NPRM focuses on process rather than substance. Thus, the NPRM posits that giving “unchecked discretion to supervisors,” not giving supervisors sufficient guidance and training, basing decisions on “subjective” criteria and on “criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn or technological skills” negate a finding that the employer based a decision on factors other than age. 75 Fed. Reg. at 7217. This assertion is not compatible with Hazen Paper or Meacham.

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3 No authority is cited for the conclusion that these factors are known to be susceptible to age-based stereotyping.
An example may help to illustrate the fundamental flaw with the NPRM. Suppose an employer decides that it needs to reduce its workforce, and that it will base its decision on whom to keep and whom to let go on the employee’s “flexibility.” Suppose further that without training or objective criteria, the employer’s managers select the least flexible employees, and that the group so selected is disproportionately older. Suppose further that, at trial, the managers testify, under oath and subject to vigorous cross-examination, and explain why they concluded that the selected employees were less flexible than those who were not selected. Finally, suppose that the jury, having heard all the evidence, determines that the employer’s decisions were, in fact, based on the employees’ relative flexibility. Under the plain language of the statute, and under the Supreme Court’s language in *Meacham*, a decision based on flexibility is a decision based on a reasonable factor other than age, provided that the employer meets its burden of persuading the jury that that was the basis for the decision. In this example, therefore, the law is clear: The employer has not violated the ADEA, and the verdict must be entered for the defense.

Under the NPRM, however, the outcome could be dramatically different. The court would not even ask the jury to decide whether this employer had, in fact, based its decision on the employees’ flexibility – rather, the court would ask the jury to assess not the employer’s actual decision, but instead the process by which the decision was reached. Under the NPRM, what would determine the outcome of the case would be the jury’s weighing of the lack of objective criteria, the absence of training and guidelines, and the failure to consider alternatives with lesser impact. That is simply not what the ADEA provides.

Although an employer, as in this example, may fail to utilize accepted effective HR practices, it does not necessarily follow that the procedures and actions taken are unlawful. For example, lawyers and HR professionals advise employers to document certain conversations, but the absence of documentation does not mean the employer has violated the law, it merely makes it harder for the employer to prove what was said.

Analysis of the NPRM – Practical Flaws

Apart from its lack of fidelity to the language of the statute and the Supreme Court cases, the NPRM would be impractical to apply and would require the Commission and the courts to assess matters far outside their expertise.

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*Even though the employer in *Meacham* had failed to train its supervisors or develop objective standards for measuring flexibility, the Court had no difficulty envisioning a defense verdict. The Court vacated the Second Circuit decision because the burden of proof had been assigned to the wrong party, but the Court expressed no view on the question “[w]hether the outcome should be any different when the burden [of persuasion] is properly placed on the employer.” 128 S. Ct. at 2406-07.*

*Actually, under the NPRM, once the court instructed the jury to consider these factors, among others not specified, the jury would still be given no guidance on how to reach a decision. The court would presumably instruct the jury to determine what a “prudent employer, mindful of its responsibilities under the ADEA,” would have done “under like circumstances.” How the jury will be able to make that determination is a mystery to us.*
The NPRM is predicated on the model that every personnel action is the result of a decision-making process focused solely on that particular action. In some cases, such as a large-scale reduction-in-force, that may be true. But those are exceptional cases; employers take actions every day on individual situations, and not every action is, or can be, or should be, the result of a focused decision-making process as envisioned under the NPRM. The reality of daily decision-making in the workplace renders the level of scrutiny required by the proposed rule impractical.

For example, suppose an employer adopted a policy of laying off employees in inverse order of seniority. That is a fairly common practice, and one that does not usually result in an adverse impact on older workers. In a particular case, however, an employer who had made aggressive efforts to recruit older workers could find that the least senior employees were also the oldest. In that situation, application of the seniority rule would have an adverse impact. Under the plain language of the ADEA and the Supreme Court cases, the employer could quickly and easily respond to a disparate-impact claim by citing the seniority rule as an RFOA defense. We do not believe the EEOC would analyze this situation any differently.

Under the NPRM, however, how would the Commission investigate that charge? It is impossible to say. The EEOC investigator would have to determine the “extent” to which various elements were considered by the employer. How much training and guidance was given? What do other employers do (and how would the Commission determine this)? How many employees were affected by the layoff? How many alternatives to the layoff were considered? In any layoff situation, the employer could have chosen any number of alternatives – for example, reduce the advertising budget, change the product lines, hire more sales people. On what basis is the EEOC going to decide what a “reasonable employer” would have done under all of the facts and circumstances? Moreover, as every HR professional can personally attest, in the real world, employers must make decisions in the context of such practical forces as limited budgets and limited time. There is no suggestion in the NPRM that the hypothetical “reasonable employer” labors under such constraints.

Consider how the City of Jackson case would have fared if it had been brought under the NPRM rules. There is no indication in the Supreme Court decision that the employer there trained its managers or gave them guidance; there is no suggestion that the employer was even aware that its salary plan disproportionately affected older workers; and the employer there almost certainly gave no thought to alternatives. Nevertheless, to the Supreme Court, the validity of the RFOA defense was patent. Under the NPRM, the investigator assigned to the discrimination charge would be left to second-guess the City’s selection of comparator communities, the training given to the persons responsible for devising the City’s salary structure, the City’s culpability for its failure to foresee the disparate impact of its salary arrangement, and the significance to be attached to the City’s failure to consider alternative arrangements that would have had a lesser impact. Having considered all of those factors, the investigator still cannot ascertain from the NPRM what conclusion he should reach.
One example from the NPRM illustrates the limitations of the Commission’s expertise and the impracticality of its approach. The NPRM states that an employer seeking to cut costs in its sales force should not focus on the sales people with the highest salaries but should also “consider[] the sales revenues that the affected individuals generated. By considering revenue as well as salary, the process would reasonably achieve the employer’s important goal of cutting costs without unfairly limiting the employment opportunities of older individuals.” 75 Fed. Reg. at 7216.

The NPRM’s attempt to give businesses advice on how to better take care of the bottom line is ill-conceived. The correlation between revenue generated and salary is, at best, imperfect. For many employers, employees get salary increases based on additional years of service, not specifically on increases in revenue generated. Thus, retaining the highest-salary sales persons while terminating lower-paid sales persons will usually be the more costly alternative, as the sales made by the higher-paid sales persons will be picked up by the remaining sales force; in those situations where the consideration of revenue as opposed to salary will save the most money, the business community can generally be relied upon to figure out how to advance its economic self-interest and act accordingly.

The Commission has neither experience nor expertise in running a successful business. By adopting the NPRM in its current form, the Commission will in effect be telling employers how to run “better” businesses. The courts have repeatedly emphasized that they do not sit as a “super personnel department,” see, e.g., Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir., 1986), and the Commission should be similarly mindful of this limitation.

An Alternative Approach

Because the rule does not adhere to the law or provide practical guidance for employers, SHRM believes that the rule should be withdrawn.

Although the NPRM cannot stand on legal or pragmatic grounds, that does not mean there is no role for the EEOC here. The focus of the NPRM is on large-scale reduction-in-force situations. Issues of disparate impact do arise in these situations, and they often lend themselves to the kind of focused decision-making process that the NPRM seeks to promote. While the NPRM does not pass muster as a rule to define the RFOA defense, it could form the basis for a compendium of “effective practices” (or, at least, useful guidance) that employers facing a large-scale reduction-in-force may want to consider.
Thank you for the opportunity to comment on the NPRM, and please consider SHRM as a resource for the development of guidelines and rules in this area. For additional information or clarification of our concerns, please contact me at 703-535-6027.

Yours truly,

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